STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESTER A. PITLAK,

Defendant-Appellant.

UNPUBLISHED
June 15, 1999

No. 209508
Recorder's Court
LC No. 97-006224

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529; MSA 28.797. Following a bench trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and was sentenced to four to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support his conviction and that the verdict was against the great weight of the evidence. In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). To sustain an unarmed robbery conviction, the prosecution must prove beyond a reasonable doubt: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) while unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994).

Here, the victim testified that he was inside the office at Midland Junk Yard when defendant came in and demanded money. When the victim refused to comply with the demand, defendant assaulted the victim with his fist. As defendant and the victim struggled on the floor, defendant kept hitting the victim in an attempt to get the victim's wallet from him. A girl entered the room and told defendant to get off of the victim. Defendant fled with the victim's wallet containing $150. As a result of the assault, the victim's wrist was broken. This evidence, viewed in the light most favorable to the prosecution, was sufficient to enable a rational factfinder to conclude that the elements of unarmed robbery were proven beyond a reasonable doubt. *Terry, supra* at 452.

Defendant also contends that the verdict was against the great weight of the evidence because his version of events was more plausible that the victim's version of the events. However, the prosecutor's case centered on the credibility of the victim. Where resolution of an issue involves the credibility of two diametrically opposed version of events, the test of credibility rests in the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). Because the evidence did not weigh heavily against the verdict, but hinged on the trier of fact's assessment of credibility, the verdict was not against the great weight of the evidence.[1]

Next, defendant argues that reversal is required because the trial court failed to advise defendant that he was waiving his *constitutional* right to a jury trial. We disagree. There is no requirement that the defendant be advised that his right to a jury trial arises from the Constitution. *People v Saxton*, 118 Mich App 681, 691; 325 NW2d 795 (1982).

Lastly, defendant contends that the trial court failed to individualize defendant's sentence by failing to take into account the circumstances surrounding the offense and the offender. However, review of the trial court's statements during sentencing reveals that the court did, in fact, take into account defendant's background and the circumstances of the conviction when fashioning an appropriate sentence. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Further, the sentence imposed was in accordance with the guidelines and is presumed proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). The circumstances cited by defendant are not unusual circumstances that would overcome the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

[1] Defendant also contends that the prosecutor failed to produce the girl or "eyewitness" to the incident. This issue is not preserved for appellate review because defendant failed to raise it below in a motion for a post-trial evidentiary hearing or in a motion for new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).